

# The Implied Termination of Community Property Agreements Upon Permanent Separation

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The three-pronged community property agreement<sup>1</sup> is a unique<sup>2</sup> combination of *inter-vivos* contract and statutory will substitute.<sup>3</sup> It permits spouses to agree on the status of property currently held, the status of property acquired in the future, and the disposition of community property upon the death of either spouse. It is only the final element, the disposition of property at death, which is authorized and controlled by statute.<sup>4</sup> The *inter-vivos* elements are controlled by general

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1. Cross, *The Community Property Law in Washington*, 61 WASH. L. REV. 13, 94 (1986). A three-pronged community property agreement contains terms that address the status of property currently held, the status of property acquired in the future, and the disposition of community property upon the death of either spouse. Agreements that deal with fewer terms, while not considered three-pronged agreements, may still be perfectly valid community property agreements.

2. In *Reagh v. Dickey*, 183 Wash. 564, 573, 48 P.2d 941, 945 (1935), the Washington Supreme Court noted that the statute allowing husband and wife to contractually provide for the disposition of community property at the death of either was unique among all other states.

3. See Oltman and Reutlinger, *The Statutory Community Property Agreement as a Will Substitute on the Death of the Second Spouse*, 19 GONZ. L. REV. 511 (1983/84); see Cross, *supra* note 1, at 94, 101.

4. WASH. REV. CODE § 26.16.120 (1986) provides as follows:

Nothing contained in any of the provisions of this chapter or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: *Provided, however*, That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud or under some other recognized head of equity jurisdiction, at the suit of either party.

See also Oltman and Reutlinger, *supra* note 3, at 512.

contract principles.<sup>5</sup> It is common practice to combine the statutorily authorized will substitute provision with the *inter-vivos* contract provisions into one formal agreement.<sup>6</sup>

There are many combinations of *inter-vivos* and at-death elements that spouses may choose. On the other hand, the spouses may simply choose to have an at-death distribution without agreeing on the status of property during their lifetimes. The usual agreement contains a combination that declares the status of currently held property (usually labeling it community), agrees upon the status of future acquisitions (usually that they will attain community status upon receipt), and describes the distribution of community property upon the death of either spouse (usually that the surviving spouse receives all community property).<sup>7</sup> Such an agreement will cause all property owned or acquired by the spouses to be converted to community property immediately upon acquisition and distributed to the survivor upon death.

Since the statutory community property agreement is only available under the statute to husband and wife, the statutory element is by definition terminated upon dissolution. Therefore, community property agreements seldom contain a term dealing with dissolution. However, neither the statutes nor the case law provides any guidance for spouses having a community property agreement who, while not divorced, are permanently separated and living "separate and apart"<sup>8</sup> in a defunct marriage. The law should provide guidance in this situation; community property agreements should terminate upon the permanent separation of spouses.<sup>9</sup>

This Article will assess the effect of living separate and apart in a defunct marriage on the typical community property agreement, including both *inter-vivos* and at-death elements. First, as background, this Article will explain and analyze the Washington law status of the concept of living separate and apart. Second, this Article will then review the facts and the

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5. See WASH. STATE BAR ASS'N, WASHINGTON COMMUNITY PROPERTY DESKBOOK § 5.10 (2d ed. 1989); Cross, *supra* note 1, at 102; Oltman and Reutlinger, *supra* note 3, at 512.

6. See, e.g., *In re Estate of Brown*, 29 Wash. 2d 20, 185 P.2d 125 (1947). However, it is not required that all provisions appear in every agreement.

7. WASHINGTON WILL AND TRUST MANUAL SERVICES, § XVII (1979); see Oltman and Reutlinger, *supra* note 3.

8. For a discussion of living "separate and apart," see *infra* notes 10-19 and accompanying text.

9. Cross, *supra* note 1, at 104.

holding of *In re Estate of Lyman*,<sup>10</sup> an appeals court case illustrating the typical fact situation and setting forth the approach of the Washington Supreme Court in this area. It remains the best and most instructive example to date of this issue. Third, the Article will discuss the general contract law concept of implying an omitted contract term when it appears that policy and efficiency dictate that such a term be implied. Fourth, the Article will suggest implying a term of termination in community property agreements upon permanent separation, analogizing to the law of acquisitions while living separate and apart. Finally, the Article explores the policy benefits of implying such a term in community property agreements.

The treatment the law gives to property acquisitions by spouses while living separate and apart provides the basic policy support for the implication of an omitted term in community property agreements. Since that policy likely reflects what most permanently separated spouses would want, it is also likely to reflect the intent of most spouses with respect to the validity of community property agreements during permanent separation. Therefore, this Article concludes that a term should be implied in each community property agreement terminating such agreements upon a permanent separation.

## I. HISTORICAL BASIS FOR THE CONCEPT OF LIVING SEPARATE AND APART

The concept of living separate and apart has long been part of the Washington statutory scheme, especially as it relates to wives. Prior to 1972, Wash. Rev. Code § 26.16.140, which was originally enacted in 1881, provided that the earnings and accumulations of a wife while living separate from her husband were her separate property.<sup>11</sup> That statute recognized that, while a technical "marital" status might still remain, the "community relationship" upon which the community property principles were based no longer existed.<sup>12</sup> In 1948, the Washington Supreme Court extended this same concept to husbands in *Togliatti v. Robertson*.<sup>13</sup> The legislature consolidated the treatment of husbands and wives in its 1972

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10. 7 Wash. App. 945, 503 P.2d 1127 (1972), *aff'd*, 82 Wash. 2d 693, 512 P.2d 1093 (1973) (adopting opinion of Court of Appeals).

11. WASH. REV. CODE § 26.16.140 (1986).

12. *See id.*

13. 29 Wash. 2d 844, 852, 190 P.2d 575, 578-579 (1948).

amendment to Wash. Rev. Code § 26.16.140. Since then, by statute, the earnings and accumulations of either husband or wife are separate property while living separate and apart.<sup>14</sup>

While the 1972 amendments clarified application of the statute, the question remains whether the spouses are in fact living separate and apart. Over the years, courts have given the term "separate and apart" some meaning. Primarily, these courts have attempted to define circumstances that will indicate that the spouses have abandoned the community with no fixed intent to reconcile.<sup>15</sup>

In most cases that have found spouses to be living separate and apart, the couple involved has either signed a separation agreement,<sup>16</sup> filed for dissolution,<sup>17</sup> or obtained some form of interlocutory decree.<sup>18</sup> While such technical indications of intent are not necessary, it seems such indications may be the easiest way of overcoming the presumption of an ongoing community.<sup>19</sup> Finally, both spouses must accept and acknowledge the termination of the community. One spouse cannot unilaterally destroy the community short of a dissolution. However, once both spouses have accepted and acknowledged the termination of the community, only the technical marital status remains.

While Washington courts have, to a certain extent, clarified the status of living "separate and apart," the courts have not analyzed the effect of this status on community property agreements. Spouses having such an agreement but living separate and apart are left in a state of legal limbo. The community is severed, but the community property agreement is whole because the spouses are not yet divorced. Because the

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14. WASH. REV. CODE § 26.16.140 (1986).

15. "[M]ere physical separation of the parties does not establish that they are living separate and apart sufficiently to negate the existence of a community." *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wash. App. 351, 354, 613 P.2d 169, 171 (1980). The case of *Rustad v. Rustad*, 61 Wash. 2d 176, 377 P.2d 414 (1963), exemplifies this principle. In *Rustad*, the husband was separated from his wife due to her confinement in a mental institution. The court found there was no evidence they had abandoned the community even though they had been separated for so many years. *Id.* at 180, 377 P.2d at 416. Hence, they were not living "separate and apart." *Id.*

16. *In re Estate of Osicka*, 1 Wash. App. 277, 461 P.2d 585 (1969).

17. *MacKenzie v. Sellner*, 58 Wash. 2d 101, 361 P.2d 165 (1961).

18. *Togliatti v. Robertson*, 29 Wash. 2d 844, 190 P.2d 575 (1948).

19. "When they have not yet chosen to institute dissolution proceedings, the continued integrity of their marriage should be presumed except under the most unusual circumstances." *Aetna Life Insurance v. Boober*, 56 Wash. App. 567, 572, 784 P.2d 186, 188 (1990).

agreement retains life, even if the marriage does not, the spouses are left unsure as to the true status of their property. The court in *In re Estate of Lyman* failed to apply the law of living separate and apart to community property agreements, providing no guidance or solutions to separated spouses with such agreements.

## II. IN RE ESTATE OF LYMAN

### A. *Factual Background*

The 1972 court of appeals case, *In re Estate of Lyman*,<sup>20</sup> presents the situation described above. Ralph and Jannie Lyman were married in 1959. In 1964 they executed an "Agreement as to Status of Community Property" pursuant to Wash. Rev. Code § 26.16.120.<sup>21</sup> At the same time they executed reciprocal wills which gave their respective estates to the surviving spouse.<sup>22</sup>

Between 1964 and 1970, the parties separated twice and were reunited. However, in 1970 the wife filed for divorce and obtained a temporary restraining order followed by a temporary injunction enjoining the husband from "selling, assigning or encumbering" any of the community property. There is no indication in the opinion whether the Lymans were living separate and apart in a defunct marriage at this time or even whether they were separated at all. One week after the wife filed for divorce, the husband executed a new will giving one-half of his community property to his stepsons (his wife's children by a former marriage). This will, of course, was in direct contradiction to the community property agreement which apparently passed all community property to the surviving wife. Three weeks after he executed the new will, the husband died. The wife recorded the community property agreement, and the stepson filed the will for probate. The trial

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20. 7 Wash. App. 945, 503 P.2d 1127 (1972), *aff'd*, 82 Wash. 2d 693, 512 P.2d 1093 (1973) (adopting opinion of court of appeals).

21. *Id.* at 946, 503 P.2d at 1129. The *Lyman* court described this agreement as being executed "under RCW 26.16.120." It did not, however, indicate whether this agreement contained only the at-death element or whether it also contained provisions for the characterization *inter-vivos* of existing and after-acquired property. However the primary focus of the court's opinion is on the at-death element.

22. *Id.* It is not uncommon to execute wills concurrently with a community property agreement. The execution of concurrent wills resolves problems that arise if the agreement is revoked, if the surviving spouse dies without the opportunity of executing a will, or if one of the spouses acquires property not covered by the terms of the agreement.

court admitted the will to probate, but found that the community property agreement was valid and that it prevailed over the will. Subsequently, the court dismissed the proceedings in probate, and the stepson appealed.

On appeal the stepson argued that the parties had mutually abandoned the community property agreement when the wife filed for divorce and when the husband executed the contradictory will. The court noted that the community property agreement was a "contract *sui generis*."<sup>23</sup> As with any contract, it could be abandoned by mutually manifested intention, but the inconsistent actions of one party would not be sufficient to effect an abandonment.<sup>24</sup> However, it would be sufficient if the inconsistent conduct by one party was acquiesced in by the other party.<sup>25</sup> By definition, "uncommunicated subjective mutual intention" is not enough.<sup>26</sup> In other words, it was not sufficient that both parties independently wanted an abandonment of the agreement. Because the contract was bilateral, the parties could not abandon it without a clear manifestation of the intent to abandon by one party and then an acquiescence or acceptance by the other party.<sup>27</sup> The intention must be a "manifested intention." According to the *Lyman* court, such manifestation involves both foresight of the consequences and a desire to do the things foreseen.<sup>28</sup> There was no evidence that the wife foresaw or desired the abandonment of the community property agreement simply by her filing her complaint for divorce.<sup>29</sup> Likewise, the execution by the husband of a conflicting will, while manifesting his intention, was not evidence of abandonment without the knowledge and acquiescence of the wife.<sup>30</sup>

### B. Analysis of *Lyman*

The court in *Lyman* focused solely on the issue of whether

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23. *Id.* at 948, 503 P.2d at 1130. *Sui generis*, of course, means the only one of its kind, peculiar or special. In many ways the community property agreement is special, certainly unique in that it allows husband and wife to contractually agree to the disposition of their property at death. On the other hand, as unique as it is, it is still a contract and must be interpreted and analyzed in light of contract principles.

24. *Id.*

25. *Id.* at 948-49, 503 P.2d at 1130.

26. *Id.* at 949, 503 P.2d at 1131.

27. *Id.* at 948-49, 503 P.2d at 1130-31.

28. *Id.* at 949, 503 P.2d at 1131.

29. *Id.* at 949-50, 503 P.2d at 1131.

30. *Id.* at 951, 503 P.2d at 1132.

the husband and wife had, by their actions, abandoned their community property agreement. In doing so, the court applied only one of the possible methods of analysis that it could have used. Abandonment is, in a sense, a form of rescission. It occurs when the parties mutually decide they no longer intend that their agreement be operative. Many courts have described exactly how a rescission (or an abandonment) can be accomplished.<sup>31</sup> In each case, the court makes the rescission determination at the end of the term of the agreement, which often occurs at the end of the marriage. It is not a matter of contractual interpretation, but rather of contractual termination; moreover, it has nothing whatsoever to do with the intent of the parties when they executed the agreement (absent, of course, a clause dealing with rescission or abandonment).

The *Lyman* court could have used another method of analysis. The court could have implied an omitted term in the parties' agreement that would terminate the community property agreement when the parties are living separate and apart in a defunct marriage. Such a term should be implied in most community property agreements based on the likely intent of the parties, the public policy of the state, and the efficient resolution of such disputes.

### III. IMPLICATION OF OMITTED TERMS

The community property agreement is a statutorily authorized contract that allows husband and wife to dispose of community property upon the death of either.<sup>32</sup> The analysis of the agreement must, therefore, derive essentially from contract principles. One of those principles, the implication of an omitted term, has direct application to the situation of a couple that is permanently separated.

Parties to a contract generally form expectations with respect to only a limited number of situations. Of those expectations, the parties usually reduce only a portion to writing. The terms most likely to be included in the contract are those

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31. *In re Estate of Wittman*, 58 Wash. 2d 841, 365 P.2d 17 (1961); *In re Estate of Brown*, 29 Wash. 2d 20, 185 P.2d 125 (1947); *Monroe v. Fetzer*, 56 Wash. 2d 39, 350 P.2d 1012 (1960); *Mumm v. Mumm*, 63 Wash. 2d 349, 387 P.2d 547 (1963). However, the *Lyman* court did not consider the possibility that once the parties had permanently separated, they had abandoned the marriage and thus, had also abandoned their marriage-based agreements. In contrast, once the parties have permanently separated, their property acquisitions are separate under WASH. REV. CODE § 26.16.140 (1972).

32. WASH. REV. CODE § 26.16.120; see *supra* notes 1-7.

that describe performance in the normal course of events. Generally, non-performance items—those items that do not describe directly the obligations of each party under the contract—might affect the parties' ability to perform but would only be included if foreseeable and desirable. In addition, terms may be omitted because they were unforeseen (the parties overlooked the obvious) or unforeseeable (the situation was impossible to anticipate). Terms may be omitted because the situations to which the terms might pertain, while foreseen, were either unlikely to arise during the term of the agreement or were not discussed during the negotiation process because to do so would have been indelicate, counter productive, or both.

Before the court can begin to consider whether an implied term is appropriate, it must interpret the existing terms of the contract to determine if any of them apply or are intended to apply to the situation. Only if there are no applicable terms does the court proceed to the question of implication. By definition, if existing terms cannot be interpreted to apply to the situation under consideration, then the only way the contract has any application to the case at hand is by implying a new and separate term.<sup>33</sup>

A court may base implication of terms to an agreement on expectations that are subjective (the actual, shared, common expectation of both parties), or that are objective (what most parties would reasonably expect).<sup>34</sup> To determine the shared expectations, the courts have used various indicators, such as the provisions the parties made for related cases, the course of performance after the contract has become operative, the general course of dealing, and the negotiations leading up to the contract (subject of course to the parol evidence rule and any other legal limitations).<sup>35</sup> If the court chooses to rely on the objective expectations, it is usually examining what the parties would (or should) have wanted based upon a concept of reasonableness and basic principles of fairness and justice<sup>36</sup>—that is to say, a term that “comports with community standards of

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33. RESTATEMENT (SECOND) OF CONTRACTS, § 204 (1979); A. CORBIN, CORBIN ON CONTRACTS, § 561 (1960); FARNSWORTH, CONTRACTS, § 7.16 at 520 (1982); Farnsworth, *Disputes Over Omission in Contracts*, 68 COL. L. REV. 860, 881 (1968).

34. FARNSWORTH, CONTRACTS, *supra* note 33, § 7.16 at 523.

35. *Id.*; Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 799 (1982).

36. FARNSWORTH, CONTRACTS, *supra* note 33, § 7.16 at 524.



fairness and policy.”<sup>37</sup> “Fairness” has been described primarily as avoiding economic servility; but the concept also includes convenience, the need to discourage litigation, and the socially and economically desirable placement of risk.<sup>38</sup>

An implication based on objective expectations is clearly the most common and has gone far beyond implying the actual expectations in fact of the parties. It has become, in essence, a rule of law. First, courts imply an omitted term to accommodate the interests and intentions of most people involved in the situation under consideration. Second, from the standpoint of efficient resolution, if most people would desire such a term, then implying it as a matter of course eliminates the costs of negotiation and drafting. Thereafter, only those few people who do not desire the implied result will be required to draft out of the application of the implied term.<sup>39</sup>

#### IV. IMPLICATION OF A TERM OF TERMINATION IN THE COMMUNITY PROPERTY AGREEMENT

Whether courts imply a term that terminates the usual community property agreement upon permanent separation will depend more upon the courts’ and the legislature’s analysis of public policy considerations and the treatment of related questions than on the express intentions of the parties. There is little if any basis for implication of the actual (subjective) expectations of the parties. While a permanent separation is a clearly foreseeable event, it is very seldom addressed. Moreover, since most off-the-shelf agreements do not address termination at all, the courts lack analogous express expectations on which they can base their implications.

This is one of those classic situations in which we simply cannot determine why the parties failed to account for the pos-

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37. RESTATEMENT (SECOND) OF CONTRACTS, § 204, Comment *d* (1979); Speidel, *supra* note 35, at 803.

38. FARNSWORTH, CONTRACTS, *supra* note 33, § 7.16 at 524-525; Farnsworth, *Disputes Over Omission in Contracts*, *supra* note 33, at 877-879.

39. It is costly to acquire relevant information, and to negotiate and to draft contracts providing for every possible contingency. Moreover, one function of contract law is to reduce that complexity and attendant costs by providing terms for the gaps in the contracts that were too costly to negotiate and provide for in the contract itself. Generally these terms will reflect what the parties (or most parties) would have done had they been able to draft without cost. POSNER, ECONOMIC ANALYSIS OF LAW, § 4.1 at 82-83 (3rd ed. 1986); POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS, at 27 (2nd ed. 1989).

sibility of permanent separation.<sup>40</sup> They may have felt that the law would account for it through the process of dissolution, or in other words, that the law of dissolution would supply the necessary term. This assumes, of course, that the parties perceived permanent separation as a fleeting state of limbo that is subsumed immediately into the dissolution process. In many cases, this could not be further from the truth. Separation may well turn out to be a long, tedious, and contentious state all its own, with legal and emotional attributes that are separate from either the state of marriage or the state of dissolution.<sup>41</sup> It also may be that the parties felt that the law relating to separation *prior* to dissolution would supply the term. There is some basis for this belief in the law relating to living separate and apart,<sup>42</sup> assuming the parties were familiar with that concept.

However, in many cases, the parties have only a generalized assumption that the law will provide the necessary terms in certain situations. As noted earlier, this assumption is and should be true in those cases in which the general intention of the population is clear. As is discussed below, the general intention and likely understanding of the population in the case of a permanent separation would appear to be that the agreement terminates upon permanent separation.

Even if the parties had foreseen the separation, they may have felt that separation was an event so unlikely to arise in their case that it would be inefficient and counterproductive to reduce their expectation to writing. Clearly not all expectations in remote contingencies are reduced to writing. Or, there is the possibility that, while separation was foreseen and recognized as a possibility, both parties found it indelicate and, therefore, inappropriate to raise within the confines of an otherwise happy, marital relationship. But even if it is, at best, unclear whether the parties had any expectations regarding a given situation, the courts will often imply a term based upon the hypothetically projected expectations of reasonable individuals in the same situation.<sup>43</sup>

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40. Farnsworth, *Disputes Over Omission in Contracts*, *supra* note 33, at 868-873.

41. See discussion of the law of living separate and apart, *supra* notes 10-19 and accompanying text, *infra* notes 44-55 and accompanying text.

42. *Id.*

43. This is part of the court's "fairness analysis," which has been a part of the implication process, but which also comes perilously close to writing the contract for the parties after the fact with no evidence of expectations or understandings

To the extent that the parties expected the law to provide omitted terms, developing the set of hypothetical expectations also fulfills the parties' expectations, since all are based upon the same public policy principles. Therefore, supplying, as implied, a term that the parties would have wanted had they considered the matter, or a term that they assumed the law would provide, must rely on the relevant public policy and an efficient approach to the resolution of such disputes.

Implication of a term that would terminate the community property agreement upon permanent separation has support both in the general policy relating to property acquisitions after a permanent separation and in the efficient resolution of disputes. In other words, most parties would want the courts to imply such a term and by doing so, the courts will further the attitude of the law in general pertaining to property acquisitions after permanent separation.

The general philosophy of the law of acquisitions during that separation provides the most likely basis for implication of terms for a community property agreement in the case of permanent separation.

#### V. IMPLICATION OF TERMS BASED UPON THE PRINCIPLES OF PERMANENT SEPARATION

The principles for property acquisition during a permanent separation appear directly analogous to the application of a community property agreement during a permanent separation.<sup>44</sup> As in the typical community property agreement, most parties, upon entering into marriage, fail to provide for or agree on the ownership of assets acquired during a permanent separation.<sup>45</sup> Since the marriage is not yet dissolved, however, the property acquired remains characterized as community under normal community property principles.<sup>46</sup> However, statutory and case law provide an express exception for the parties

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whatsoever. As discussed above, it becomes more like a rule of law that coincides with the expectations—or *likely* expectations—of most people in the same situation. See Farnsworth, *Disputes Over Omission in Contracts*, *supra* note 33, at 877-879; Speidel, *supra* note 35, at 803.

44. For a discussion of the status of living "separate and apart," see *supra* notes 10-19 and accompanying text.

45. Here, too, it is impossible to tell whether the parties' failure to provide for the possibility of permanent separation was attributable to an oversight or was simply ignored as unlikely to occur or indelicate to raise.

46. WASH. REV. CODE § 26.16.030 (1986); see *Yesler v. Hochstetler*, 4 Wash. 349, 30 P. 398 (1986).

in this situation.<sup>47</sup>

Originally, Wash. Rev. Code § 26.16.140 provided that the earnings of the wife would be her separate property while living "separate from her husband."<sup>48</sup> One possible theory for such an exception is that the wife was in need of protection and should not be responsible in any way for the support of her (possibly wayward) husband after they had permanently separated. While this is conjecture, it is certainly plausible given the time of the statute's adoption—1881—and its application to wives only. However, this principle was extended to acquisitions by husbands as well in the holding of *Togliatti v. Robinson*.<sup>49</sup> In *Togliatti*, the court imposed a requirement that, for purposes of acquisitions made while permanently separated, the parties must maintain a "community" as well as a "marital" relationship.<sup>50</sup> The premise of most community property law is that the marriage is a type of joint venture<sup>51</sup> and that the products of that venture should be shared equally. There is an implication within that premise that the law will not scrutinize the activities of each individual spouse. Rather, the law will presume that the spouses' activities, by definition, contribute to the community and result in a community ownership of the products.

Reasoning that the joint venture aspect of the relationship ceases to exist upon permanent separation, the court in *Togliatti* held that acquisitions by the husband during the defunct marriage would be separate property. At this point, there could be no presumption of contributions by both and, as a result, no joint ownership.<sup>52</sup> In addition, the court recognized that, while there was no "formal agreement," the parties had

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47. WASH. REV. CODE § 26.16.140 (1986); *Togliatti v. Robertson*, 29 Wash. 2d 844, 190 P.2d 575 (1948).

48. WASH. REV. CODE § 26.16.140 (1986) provided as follows:

The earnings and accumulations of the wife and of her minor children living with her, or in her custody while she is living separate from her husband, are the separate property of the wife.

The original version of the statute, which is quoted above, was amended in 1972. It now applies to acquisitions by either the husband or the wife. For the text of the amended version of the statute, see *infra* note 54.

49. 29 Wash. 2d 844, 190 P.2d 575.

50. *Id.* at 852, 190 P.2d at 578-79; Cross, *supra* note 1, at 33.

51. Since the community is unique and not a true legal entity, most commentators avoid comparisons to partnerships, joint tenancies and joint ventures, and the like, even if the attributes are quite similar. "Joint venture" is used here in its broadest descriptive sense and is not meant at all to suggest a true legal joint venture.

52. *Togliatti*, 29 Wash. 2d 844, 852, 190 P.2d 575, 579 (1948).

demonstrated, by their conduct, that acquisitions during this period were the separate property of the acquirer.<sup>53</sup> While this approaches an implication of a term to the marriage contract, it could also be viewed as either a new agreement or a modification of the existing agreement. In any case, policy considerations and the likely intent of parties make reasonably clear that permanent separation does and should alter the legal structure of the community for purposes of property acquisition.

The policies behind the original RCW 26.16.140 and the *Togliatti* decision provided the impetus for a revised Wash. Rev. Code § 26.16.140. In 1972, the legislature extended the rule pertaining to property acquisitions while living separate and apart to both husband and wife.<sup>54</sup> It is not clear whether all aspects of prior case law, especially those relating to husbands, would be incorporated; however, they are certainly likely to be incorporated to the extent that they do not conflict with the express terms of the statute.<sup>55</sup>

The policy behind Wash. Rev. Code § 26.16.140 and the *Togliatti* decision could also support the implication of a term in the community property agreement that terminates the agreement upon permanent separation. The failure of the joint venture aspect of the marital relationship eliminates a crucial element necessary for characterizing property acquisitions as community.<sup>56</sup> The concept of joint venture is certainly a part of the underpinning and a prerequisite for the community property agreement as well.<sup>57</sup> Furthermore, the joint venture is significant evidence of what the reasonable expectations of the parties would be. The policy behind Wash. Rev. Code § 26.16.140 is in part based upon the legislature's perception of

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53. *Id.*

54. WASH. REV. CODE § 26.16.140 (1972), which reads:

When a husband and wife are living separate and apart, their respective earnings and accumulations shall be the separate property of each. The earnings and accumulations of minor children shall be the separate property of the spouse who has their custody or, if no custody award has been made, then the separate property of the spouse with whom said children are living.

55. Cross, *Equality For Spouses In Washington Community Property Law: 1972 Statutory Changes*, 48 WASH. L. REV. 527, 531 (1973).

56. See *supra* notes 51-52, and accompanying text.

57. It is the underpinning and a prerequisite for the statutory element of those community property agreements under WASH. REV. CODE § 26.16.120 (1986), which are only available to "the husband and wife" who must "jointly" enter the agreement.

what the parties would have wanted upon failure of the joint venture.

At the time spouses execute a community property agreement (whether it applies to existing property, future acquisitions, or at-death distribution), it is premised to a large extent upon the existence of the underlying joint venture aspect of their marriage. It is certainly possible that the parties could agree to the conversion of all separate property to community property and the distribution of community property to the survivor upon the death of the first to die *while they are permanently separated*, but it is very unlikely that they would do so. It would seem almost certain that the provisions in the agreement dealing with property conversions and distributions are dependent upon an ongoing marriage, a relationship in which the product of each person's efforts is shared equally. As has been discussed above, that is simply not the case when there has been a permanent separation. Therefore, it seems consistent to imply a term which terminates the agreement once one of the primary bases for the agreement is lost.

#### VI. *INTER VIVOS VS. AT-DEATH PROVISIONS: THE IMPACT OF IMPLIED TERMS*

The implication of a term terminating the community property agreement upon permanent separation could also help in carrying out the policy of the defunct marriage statute.<sup>58</sup> If the agreement did not have a term (implied or express) that terminated the contract upon permanent separation, it is likely that Wash. Rev. Code § 26.16.140 would characterize each spouse's earnings as separate. At the same time, if still in effect, the *inter-vivos* conversion clause in the community property agreement could then operate to re-convert that separate property into community property and, in effect, undermine the policy of the statute.<sup>59</sup> The possibility of reconversion in spite of the intent of Wash. Rev. Code § 26.16.140 further argues for an implied term of termination upon perma-

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58. WASH. REV. CODE § 26.16.140 (1986).

59. Most common community property agreements refer to current holdings, future acquisitions, and at-death distribution (which is authorized by WASH. REV. CODE § 26.16.120 (1986) and requires formality). In most cases, the second clause, which relates to future acquisitions, converts separate property acquisitions to community. To the extent that earnings during a defunct marriage are separate, such a clause could re-convert them to community after WASH. REV. CODE § 26.16.140 (1986) converted them to separate.

nent separation, especially with respect to the *inter-vivos* conversion clause.

Whether the policy with respect to this possible reconversion might differ when dealing with the *inter-vivos* conversion clause as compared to the the statutory at-death clause may be debated. The *inter-vivos* clause, if it operates as an immediate conversion from separate to community,<sup>60</sup> can undermine the policy behind the defunct marriage statute (Wash. Rev. Code § 26.16.140); however, if the at-death clause continues untermiated, it has little or no perceptible impact on the defunct marriage statute and the policy behind it. For instance, without the *inter-vivos* conversion clause (which would reconvert defunct marriage-mandated separate property back to community), the at-death clause would only dispose of community property. By definition, since all post-separation property acquired is separate, the only property that could be community had to have been acquired prior to the separation. Of course, if there were an *inter-vivos* conversion clause still operable, then the at-death clause would distribute post-separation separate property as converted community property. Thus, such a distribution would further undermine the policy behind Wash. Rev. Code § 26.16.140.

The only established policy on this question comes from the execution of wills statute,<sup>61</sup> and even more specifically, from the post-testamentary divorce statute.<sup>62</sup> That statute expressly revokes the portions of a will in favor of a former spouse following a divorce. Until the divorce is final, the will remains operative and effective regardless of the separated status of the parties (permanent or otherwise). This dependence on final dissolution is likely based in part on the legislature's difficulty in determining, as an evidentiary matter, when the status of the parties has actually reached a permanent and divorce-like position.

While it is very likely, if not uniformly so, that the parties would want to revoke a will in favor of their former spouse if the divorce were final, the legislature may feel less certain about the parties' likely intent in those intermediate steps prior to final divorce. However, the same legislature has recog-

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60. See *supra* notes 1-7 and accompanying text for a discussion of the "first prong."

61. WASH. REV. CODE § 11.12.020 (1987).

62. WASH. REV. CODE § 11.12.050.

nized the termination of the relationship short of divorce in the defunct marriage statute (as it relates to community property acquisitions after permanent separation).<sup>63</sup> In addition, the legislature has provided (with judicial interpretation) a reasonably effective means for identifying when a defunct marriage has finally occurred.<sup>64</sup>

The other possible basis for the legislature limiting will revocation to final divorce may be the ability of each party, unilaterally, to revoke his or her will prior to divorce (during the intermediate stages of separation) and to write a new will if they so desire. That possibility does not exist for the community property agreement since it is a bilateral contract and may only be rescinded by mutual agreement.<sup>65</sup> That difference alone may be enough to decide that the policies underlying the post-testamentary divorce statute<sup>66</sup> are not sufficiently analogous to control in the otherwise similar community property agreement situation.

In summary, while the policy behind the post-divorce statute might indicate that only divorce should amount to a revocation/termination, there may be reasons that the legislature limited revocation to divorce that would not necessarily apply to the implication of a term of termination in community property agreements.

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63. See *supra* notes 10-19, 44-55 and accompanying text.

64. *Oil Heat Co. of Port Angeles v. Sweeney*, 26 Wash. App. 351, 613 P.2d 169 (1980) (infrequent appearances at home were not enough to declare the marriage defunct); *Peters v. Skelman*, 27 Wash. App. 247, 617 P.2d 448 (1980); *In re Estate of Nikiporez*, 19 Wash. App. 231, 574 P.2d 1204, *rev. denied*, 90 Wash. 2d 1013 (1978); *In re Estate of Osicka*, 1 Wash. App. 277, 461 P.2d 585 (1969); *Rustad v. Rustad*, 61 Wash. 2d 176, 377 P.2d 414 (1963) (no renunciation of marriage despite commitment of wife to an out-of-state mental institution); *Makeig v. United Security Bank and Trust Co.*, 112 Cal. App. 138, 296 P. 673 (1931) (living together for six weeks out of a 14-1/2 year marriage was not determinative of a permanent separation). See *supra* notes 10-19 and accompanying text. This is not intended as a brief for the extension of the post-testamentary divorce statute to permanent separation (although it could be argued at a later date). Rather, it is an attempt to seek out any analogous policies that may bear on the implication of a term which terminates the at-death clause.

65. *In re Estate of Ford*, 31 Wash. App. 136, 639 P.2d 848 (1982); *In re Estate of Lyman*, 7 Wash. App. 945, 503 P.2d 1127 (1972), *aff'd* 82 Wash. 2d 693, 512 P.2d 1093 (1973) (adopting opinion of Court of Appeals); *In re Estate of Wittman*, 58 Wash. 2d 841, 365 P.2d 17 (1961). WASH. REV. CODE § 26.16.120 (1986) states that rescission must be done in the same manner as the execution. The above cases as well as others, have interpreted this statutory language to include less formal means of rescission if the parties clearly demonstrate their mutual intent to rescind. However, the intent must in fact be mutual.

66. WASH. REV. CODE § 11.12.050 (1987).



## VII. ESTATE OF LYMAN REVISITED: CONCLUSION

In *Lyman*, the court found that filing for dissolution, possible separation, and the execution of wills inconsistent with an existing community property agreement did not amount to an abandonment.<sup>67</sup> Thus, the parties' community property agreement remained in effect. The court did not discuss the possibility that the permanent separation of the parties might constitute an abandonment of the marriage, and, therefore, a concomitant abandonment of the marriage-dependent agreements like the community property agreement.<sup>68</sup> Nor did the court discuss the other possible approach: implication of a term in the agreement which, in effect, terminates the agreement upon permanent separation ("living separate and apart" in a defunct marriage).

The implication of a term of termination in a community property agreement is based upon the general policy of treating the parties as separate units, as opposed to a community unit, once the parties have permanently separated. Since we already treat the parties as separate units for property acquisition purposes during a permanent separation, a consistent policy would also imply a term for them that would terminate such a primary property-distributive document like the community property agreement. Such an implied term is also consistent with the law's sense of efficient resolution of disputes and of providing clear legal rules in those areas where the parties' intent is sufficiently certain, in order to avoid the high costs of drafting and negotiation absent such objectively implied terms.

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67. 7 Wash. App. 945, 503 P.2d 1127.

68. WASH. REV. CODE § 26.16.120 (1986); Cross, *supra* note 1, at 104.